

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CASSIE KAY DOEBELE

Claimant

VS.

NBA KANSAS CHRISTIAN HOME INC.

Respondent

AND

AMERICAN HOME ASSURANCE CO.,

CONTINENTAL CASUALTY CO. and

FIRST COMP INSURANCE CO.

Insurance Carriers

Docket No. 1,028,667

ORDER

STATEMENT OF THE CASE

Claimant appeals the March 5, 2007 Preliminary Hearing Order of Administrative Law Judge Bruce E. Moore. Claimant was denied benefits after the ALJ determined that claimant had failed to prove her work duties caused or contributed to a herniated disc at L4-L5. Claimant appears in person and by her attorney Brian D. Pistotnik of Wichita, Kansas. Respondent and its insurance carrier Continental Casualty Insurance Company (a.k.a. CNA Insurance Company) appear by their attorney Elizabeth R. Dotson of Kansas City, Kansas. Respondent and its insurance carrier American Home Assurance Company (a.k.a. AIG Insurance Company) appear by their attorney John B. Rathmel of Merriam, Kansas. Respondent and its insurance carrier First Comp Insurance Company appear by their attorney Joseph R. Ebbert of Kansas City, Missouri.

The record is the same as was considered by the Administrative Law Judge (ALJ), including the transcript of the Preliminary Hearing held June 13, 2006, with claimant's exhibits 1 and 2, and respondent's exhibits A through E; the transcript of the Preliminary Hearing of March 1, 2007, with claimant's exhibits 1 through 5; the transcript of the Discovery Deposition taken of claimant on June 5, 2006, with one exhibit; and the Independent Medical Examination report of Paul S. Stein, M.D., provided pursuant to the Order of the ALJ on June 19, 2006.

Claimant suffered an accidental injury arising out of and in the course of her employment on April 7, 2004, when she experienced a sudden onset of pain in her low back as she bent over to pick up an empty water pitcher. Respondent and its insurance carriers acknowledge that claimant suffered the injury on April 7, 2004. However, claimant has also alleged a series of accidents through her last day worked on April 19, 2006. This series of accidents is disputed. Respondent and its insurance carriers allege that claimant suffered an intervening injury resulting from a non-work-related automobile accident on July 2, 2004. Respondent contends this accident is the cause of claimant's ongoing problems. In the alternative, respondent argues that claimant's ongoing low back and leg problems are from the activities of everyday living and occurred while claimant was either off work for a right wrist injury, or while claimant was on light duty, which required only minimal physical activity.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹ Moreover, this review of a Preliminary Hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

ISSUES

Has claimant proven that she suffered a series of micro-trauma accidental injuries arising out of and in the course of her employment with respondent through her last day worked on April 19, 2006, resulting in a herniated disc at L4-L5?

FINDINGS OF FACT

Claimant suffered a work-related accidental injury on April 7, 2004, when, while picking up an empty plastic water pitcher, she experienced a sudden onset of pain in her low back. Claimant told her charge nurse, Alice Chaves, and was transported by ambulance to the Newton Medical Center emergency room. Most of the contemporaneous medical records discuss only back pain. But one nurse's note from Newton Medical Center dated April 7, 2004, discusses shooting pain down the right leg.

Claimant came under the care of Mark S. Dobyms, M.D., of the Wichita Clinic. Claimant was treated with medication and physical therapy with good results. By June 17, 2004, claimant was reported as having no pain to palpation in the low back. All tests were normal, and claimant was released to full duty. Claimant returned to her job with respondent with no restrictions. Claimant alleged ongoing back pain after her return to

¹ K.S.A. 44-534a.

work, but, with the exception of the one above-identified nurse's note, the medical records contain no reference to leg pain or any ongoing back symptoms at the time of her release.

Claimant neither requested nor sought additional medical treatment until after an automobile accident on July 2, 2004. At that time, she was transferred by ambulance to Newton Medical Center. She eventually came under the care of Michael K. Williams, M.D. Claimant was again treated with physical therapy and medication. Her complaints were similar to those recorded after the April 7, 2004 work-related injury. However, the medical records do specifically identify pain radiating down the right leg. This is identified as a new and different symptom. Claimant was treated by Dr. Williams until her release to return to her regular job on August 27, 2004. The only caution memorialized in the August 27 medical record advised claimant to be "a little careful with her lifting and bending".²

Claimant continued at her regular job with respondent and neither sought nor requested medical treatment for her back. On June 2, 2005, claimant suffered a work-related injury to her right wrist while turning a patient. Claimant was again referred to the Wichita Clinic. She was ultimately referred to George L. Lucas, M.D., and underwent surgery to her right wrist on December 15, 2005. Claimant performed her regular duties up to the date of the wrist surgery. Claimant was off work until February 9, 2006, when she was returned to light duty. She returned to work performing ministerial duties involving medical record filing. She was limited to the use of her left upper extremity only.

On February 7, 2006, claimant returned to Dr. Williams complaining of right buttock pain with radiation into the right leg. No injury was noted. The note from that visit indicated claimant was under a lot of stress due to health problems in her family.

Claimant continued to work light duty until she was released by Dr. Lucas to her regular job on April 17, 2006. However, she was provided a 20-pound lifting restriction from Vello Kass, M.D., of the Wichita Clinic on April 18, 2006. Claimant presented the lifting restriction to respondent immediately. She was laid off on April 19, 2006.

Claimant was referred by the ALJ to board certified neurological surgeon Paul S. Stein, M.D., on July 24, 2006, for an independent medical examination (IME). Dr. Stein was provided extensive medical records which were memorialized in his July 24 report to the ALJ. Dr. Stein noted the work-related accident of April 7, 2004, followed by the automobile accident of July 2, 2004, the right wrist injury of June 2, 2005, and a right L4-L5 disc herniation being diagnosed in approximately February of 2006. He noted the medical records associated with the first two accidents provided no good evidence of a disc

² P.H. Trans. (June 13, 2006), Cl. Ex. 1.

herniation. He noted that the first description of radiating pain into the right hip and right lower extremity was contained in the February 7, 2006 report, after which he noted several visits for back, right hip and leg pain. He found no relation between the work-related accident of April 7, 2004, and claimant's current back and leg complaints.

PRINCIPLES OF LAW

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.⁶

The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service.⁷

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁸

³ K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 2005 Supp. 44-501(a).

⁶ *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

⁷ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

⁸ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

However, the Kansas Supreme Court, in *Stockman*,⁹ stated:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, the claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.¹⁰

ANALYSIS

Claimant testifies to ongoing and numerous problems while working for respondent. However, the medical records contained herein do not support that testimony. While claimant alleges a multitude of back and leg complaints, she failed to advise any of the treating physicians of these complaints. With the exception of the 2004 records after the original injury and the auto accident, there are no back or leg complaints until February 2006, even though claimant continued to perform her regular duties as a CNA up to the date of her wrist surgery on December 15, 2005. The reports of leg and back pain in February 2006 come at a time when claimant had been off work for almost two months. Additionally, the medical note contemporaneous with those complaints fails to discuss any work-related connection to those complaints.

CONCLUSIONS OF LAW

Claimant has failed to prove that she suffered a series of micro-trauma injuries arising out of and in the course of her employment with respondent through her last day worked on April 19, 2006, resulting in a herniated disc at L4-L5.

⁹ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P. 2d 697 (1973); see also *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

¹⁰ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

ORDER

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Hearing Order of Administrative Law Judge Bruce E. Moore dated March 5, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May, 2007.

BOARD MEMBER

- c: Brian D. Pistotnik, Attorney for Claimant
 John B. Rathmel, Attorney for Respondent and its Insurance Carrier American
 Home Assurance Company
 Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier Continental
 Casualty Company
 Joseph R. Ebbert, Attorney for Respondent and its Insurance Carrier First Comp
 Insurance Company
 Bruce E. Moore, Administrative Law Judge